

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
BRITISH AMERICAN DEVELOPMENT CORP.	:	DETERMINATION
	:	DTA NO. 806636
for Revision of a Determination or for Refund	:	
of Tax on Gains Derived from Certain Real	:	
Property Transfers under Article 31-B of the	:	
Tax Law.	:	

Petitioner, British American Development Corp., 3 Cornell Road, Airport Park, Latham, New York 12110 filed a petition for revision of a determination or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law.

A hearing was held before Robert F. Mulligan, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on October 23, 1991 at 2:00 P.M., with all briefs to be filed by January 31, 1992. Petitioner appeared by Tobin & Dempf, Esqs. (Kevin A. Luibrand, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUES

I. Whether the transfer of three parcels of real property from petitioner to Watervliet Shores Associates constituted a single transfer for purposes of Article 31-B of the Tax Law.

II. Whether petitioner has shown reasonable cause for cancellation of penalties.

FINDINGS OF FACT

Petitioner, British American Development Corp., operates a real estate development business in the Albany, New York area.

By a deed dated and recorded June 20, 1980,¹ petitioner acquired a parcel of land on the

¹See, reference thereto in paragraph starting with "BEING" on the first page of Exhibit "M".

south side of Sixteenth Street, at Broadway, in Watervliet, New York. The parcel, which was conveyed by the City of Watervliet, consisted of 1.34 acres of unimproved urban development property.

Petitioner entered into negotiations with McDonald's Corporation ("McDonald's"), proposing to build a restaurant on the parcel and to lease both the land and building to McDonald's. McDonald's, however, decided to lease the land and construct its own building. Accordingly, petitioner entered into a long-term land lease with McDonald's, which then built and operated a restaurant on the parcel. Under the lease, McDonald's has the right to renew at the end of the term. If it does not, ownership of the building will revert to the owner of the land.

By deeds dated October 15, 1982 and October 18, 1982, which were recorded November 3, 1982,² petitioner purchased two additional parcels of urban development land from the City of Watervliet:

(a) One parcel was adjacent to a Price Chopper Supermarket. Price Chopper management wanted to expand the store and also provide additional parking facilities. Petitioner worked out an agreement with Price Chopper for customer parking, purchased the property and built a shopping center known as British American Plaza.

(b) The other parcel was contiguous to the British American Plaza site. Petitioner purchased the land and subsequently erected a bank building for Troy Savings Bank and leased the land and building to the bank.

On November 29, 1983, petitioner entered into three separate agreements for the sale of the parcels:

(a) Petitioner contracted to sell the British American Plaza parcel and improvements

²See, references thereto in paragraphs starting with "BEING" on the first pages of Exhibits "L" and "N".

to Watervliet Shores Associates, a New York general partnership, for \$950,000.00.³

(b) Petitioner contracted to sell the Troy Savings Bank parcel and improvements to Morris Massry for \$450,000.00. Mr. Massry was a general partner in Watervliet Shores Associates.⁴

(c) Petitioner contracted to sell the McDonald's parcel to Morris Massry for \$100,000.00.⁵

On December 19, 1983, petitioner filed transferor and transferee questionnaires for the proposed transfer of British American Plaza to Watervliet Shores Associates.⁶ On the transferor questionnaire, the date of anticipated transfer was stated to be December 23, 1983 and the computation of anticipated tax due was shown as follows:

"1. Gross consideration to be paid for transfer by Transferee	950,000.00
2. Brokerage fees to be paid by Transferor	40,000.00
3. Consideration (line 1 less line 2)	910,000.00
Complete lines 4 through 6 or line 7 whichever is applicable	
4. Purchase price paid to acquire real property	102,500.00
5. Cost of capital improvements to real property	_____
6. Original purchase price (line 4 plus line 5)	_____
7. Original purchase price paid to acquire controlling interest in entity which owns real property	_____
8. Gain subject to tax (line 3 less line 6 or line 7 whichever is applicable)	_____
9. Anticipated tax due (10% of line 8) (If exemption is claimed at Schedule A, line 3, leave blank)	_____ "

A copy of the contract and two Contractor's Application for Payment forms completed by P. J. Kenneally Construction Company, Inc. were submitted with the questionnaires.

No questionnaires were submitted for the Troy Savings Bank parcel or the McDonald's parcel.

On December 21, 1983, the Division of Taxation ("Division") issued a Statement of No

³A copy of this agreement is attached to Exhibit "G".

⁴Exhibit "K".

⁵Exhibit "J".

⁶Exhibit "G".

Tax Due to petitioner based on the questionnaires.

By deeds dated January 20, 1984 and recorded January 23, 1984, petitioner conveyed each of the three parcels to Watervliet Shores Associates (Morris Massry presumably having assigned his interests in the Troy Savings Bank parcel and McDonald's parcel to the partnership). The deeds reveal the following:

(a) The British American Plaza conveyance was made and accepted subject to an indebtedness secured by two mortgages with a total unpaid principal balance of \$1,040,000.00, plus interest, with the sum of \$705,714.29 being allocated to said parcel. This sum was assumed by Watervliet Shores Associates, which agreed to pay same as part of the purchase price.

The conveyance was also made and accepted subject to another mortgage with an unpaid principal balance of \$95,753.45, plus interest. This mortgage was apparently not assumed by Watervliet Shores Associates.

(b) The Troy Savings Bank conveyance was made and accepted subject to an indebtedness secured by two mortgages with a total unpaid principal balance of \$1,040,000.00, plus interest, with the sum of \$334,285.71 being allocated to said parcel. This sum was assumed by Watervliet Shores Associates, which agreed to pay same as part of the purchase price.

The conveyance was also made and accepted subject to another mortgage with an unpaid principal balance of \$95,753.45, plus interest. This mortgage was apparently not assumed by Watervliet Shores Associates.

(c) The McDonald's conveyance was made and accepted subject to an indebtedness secured by a mortgage on which there was an unpaid principal balance of \$96,009.72, plus interest. This sum was assumed by Watervliet Shores Associates, which agreed to pay same as part of the purchase price.

On October 29, 1986, the Division wrote to petitioner questioning petitioner's gains tax

filing for the above conveyances.⁷ The letter stated that, although the gains tax questionnaire reported consideration of \$950,000.00, the records of the Albany County Clerk showed that petitioner recorded three deeds of contiguous parcels conveyed to Watervliet Shores Associates for a consideration of \$1,500,000.00. The Division asked that petitioner supply an explanation for the discrepancy, including copies of

complete agreements for the three conveyances, within 20 days. Petitioner's attorney called the Division requesting additional time to respond and the request was granted.

On January 30, 1987, the Division again wrote to petitioner, requesting a reply within 10 days. There was no response to this letter.

As the information requested by the Division was not submitted by petitioner, the Division issued a Notice of Determination of Tax Due under Gains Tax Law on April 30, 1987.

The explanation for the assessment was, in part, as follows:

"Section 590.42 of the Gains Tax Regulations provides in part that the consideration received by a transferor for transfer of contiguous or adjacent parcels of property to one transferee is added together for purposes of applying the \$1 million exemption.

"Accordingly, since the consideration received for the 3 parcels exceeds \$1,000,000.00 all 3 parcels are subject to the Gains Tax.

"Parcel # 1 [British American Plaza]		
Cash consideration	\$ 950,000.00	
Mortgage indebtedness [sic] (unreported)	<u>705,714.00</u>	
Gross consideration	1,655,714.00	
Broker fees	<u>40,000.00</u>	
Consideration	1,615,714.00	
Purchase Price	\$48,000.00	
Capital Improvements	<u>764,505.00</u>	
Original Purchase Price	812,505.00	
Gain	803,209.00	
Tax		80,320.90
"Parcel # 2 [McDonald's]		
Cash consideration (unreported)	100,000.00	
Mortgage Indebtness [sic] (unreported)	<u>96,010.00</u>	
Gross Consideration	196,010.00	

⁷The letter also referred to an unrelated transaction which will not be addressed herein.

Original Purchase Price	0	
Gain	196,010.00	
Tax		19,601.00
"Parcel #3 [Troy Savings Bank]		
Cash Consideration (unreported)	450,000.00	
Mortgage Indebtness [sic] (unreported)	<u>334,286.00</u>	
Gross Consideration	784,286.00	
Original Purchase Price	0	
Gain	784,286.00	
Tax		78,428.60

Total Tax (3 Parcels)	\$178,350.50
Penalty (35%)	62,422.68
Interest (1-23-84 - 6-1-87)	75,725.90"

The total of the tax, penalty and interest assessed was \$316,499.08.

A Bureau of Conciliation and Mediation Services conference was held on December 15, 1987 with respect to the assessment. Pursuant to the conference, the aggregation of the three parcels was found to be proper, but the tax due was reduced to \$19,795.90 by a Conciliation Order dated November 23, 1988. The reduction was primarily due to the elimination of the mortgage indebtedness included in the calculations of gross consideration in the notice of determination and the allowance of original purchase price for the McDonald's and Troy Savings Bank parcels.

Tax, penalty and interest were recalculated as follows:

	Parcel 1	Parcel 2	
	Parcel 3 British American <u>Plaza</u>	<u>McDonald's</u>	<u>Troy Savings Bank</u>
Tax (10%)	\$10,995.90	\$4,573.30	\$4,226.70
Penalty (35%)	3,848.57	1,600.66	1,479.35
Interest 1/23/84-9/30/88	<u>6,456.23</u>	<u>2,685.21</u>	<u>2,481.71</u>
Totals	\$21,300.70	\$8,859.17	\$8,187.76
Totals on 3 Parcels:			
Tax	\$19,795.90		
Penalty	6,928.58		
Interest	<u>11,623.15</u>		
Total	\$38,347.63		

SUMMARY OF THE PARTIES' POSITIONS

Petitioner admits that the British American Plaza and Troy Savings Bank parcels are contiguous, but contends that the McDonald's parcel is not adjacent or contiguous with said parcels and therefore should not be aggregated.

The Division claims that this is not an aggregation case, but a case involving a single transfer, since it involved one transferor and one transferee. The Division also claims that the McDonald's parcel was adjacent to the other parcels despite the fact that it was separated from them by a public street.

CONCLUSIONS OF LAW

A. Tax Law § 1441 imposes a tax of 10% on gains derived from the transfer of real property within New York State.

B. The term "transfer of real property" is defined in Tax Law § 1440.7 which provides, in pertinent part, as follows:

"'Transfer of real property' means the transfer or transfers of any interest in real property by any method, including but not limited to sale, exchange, assignment, surrender, mortgage foreclosure, transfer in lieu of foreclosure, option, trust indenture, taking by eminent domain, conveyance upon liquidation or by a receiver or acquisition of a controlling interest in any entity with an interest in real property"

C. The regulations, at 20 NYCRR 590.42, provide as follows:

"Question: Is the consideration received by a transferor for the transfer of contiguous or adjacent parcels of property to one transferee added together for purposes of applying the \$1 million exemption?

"Answer: Generally, yes. A transfer of real property is defined in section 1440(7) of the Tax Law to mean 'the transfer or transfers of any interest in real property.' Thus, the separate deed transfers of contiguous or adjacent properties to one transferee are, for purposes of the gains tax, a single transfer of real property. It is the consideration for the interests in a single transfer, regardless of the number of deeds used to transfer the property, that is used to determine the application of the \$1 million exemption.

"However, if the transferor establishes that the only correlation between the properties is the contiguity or adjacency itself, and that the properties were not used for a common or related purpose, the consideration will not be aggregated.

"When the transfer is to more than one transferee, whether the amount paid for each deed transfer is added together depends on whether the transferor is subject to the aggregation clause for partial or successive transfers. (See section 590.43 of this Part.)"

D. It is clear that the transfer by one transferor to one transferee of contiguous or adjacent properties used for a common or related purpose is a transfer taxable under Article 31-B (Iveli v. Tax Appeals Tribunal, 145 AD2d 691, 535 NYS2d 234, lv denied 73 NY2d 708, 540 NYS2d 1003). Here there is no question that there was one transferor and one transferee and that all three parcels were used for a common purpose, i.e., real estate investment and development. The only question is whether the McDonald's parcel was contiguous or adjacent to the British American Plaza and Troy Savings Bank parcels. The McDonald's parcel is separated from the

others only by Sixteenth Street. As held in Matter of Calandra (Tax Appeals Tribunal, September 29, 1988), two parcels separated only by a public road are adjacent to each other. Accordingly, the consideration received by petitioner for the three parcels is to be added together for the purposes of applying the \$1,000,000.00 exemption (20 NYCRR 590.42, supra).

E. Petitioner has not sustained its burden of proof to show that its failure to file gains tax questionnaires for the Troy Savings Bank and McDonald's parcels and to pay the appropriate tax, was due to reasonable cause and not willful neglect. It is noted that consulting with and following the advice of a tax professional does not per se constitute reasonable cause (LT & B Realty Corporation v. New York State Tax Commission, 141 AD2d 185, 535 NYS2d 121). Moreover, while it is unclear if Tax Law § 1446.5, which was enacted by Laws of 1992 (ch 55, § 65), is applicable for purposes of this determination, the "substantial authority" provisions thereof would not be relevant to this case, since there was no authority for failing to file the questionnaires and the tax treatment of the British American Plaza and McDonald's transfers was not disclosed. Accordingly, the penalties imposed pursuant to Tax Law § 1446(2)(a) are sustained.

F. The petition of British American Development Corp. is denied and the notice of determination dated April 30, 1987, as modified by the Bureau of Conciliation and Mediation Services Conciliation Order dated November 23, 1988, is sustained.

DATED: Troy, New York
February 11, 1993

/s/ Robert F. Mulligan
ADMINISTRATIVE LAW JUDGE